

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE COMMISSIONER OF PATENTS AND TRADEMARKS

In re

APR 21 1998

DECISION ON PETITION

("Petitioner") requests review of the August 6, 1998, decision of the Director of the Office of Enrollment and Discipline ("Director") regarding Petitioner's request to waive the time requirement for filing a request for regrade of the August 27, 1997, registration examination. The petition is denied.

BACKGROUND

Petitioner sat for the August 27, 1997, registration examination. She received failing scores on both the morning and afternoon sections of the examination. By letter dated January 22, 1998, Petitioner was notified of her scores and informed that she "may request regrading of [her] examination pursuant to 37 CFR § 10.7(c), and that no request would be considered unless a written request is filed on or before March 22, 1998." Attachment to January 22, 1998, letter from Director (attachment titled "To: Applicants Who Failed the August 27, 1997 Examination") ("Attachment"), at 1. See also 37 C.F.R. § 10.7(c) (regrade requests must be filed within two months of notification). On May 8, 1998, Petitioner contacted the Office of Enrollment and Discipline ("OED"), seeking information about submitting an untimely request for regrade. On that same day, in response to her telephone conversation, Petitioner filed a written request for an extension of time to file a request for regrade of her score on the morning section of the August 27, 1997, registration examination ("Extension Petition").

After several telephone calls to OED, Petitioner indicates that she was told to send in her request for regrade, along with the requisite \$230 fee. It is unclear from the record when Petitioner's request for regrade was received. However, on July 10, 1998, in response to a telephone conversation with OED, Petitioner re-submitted her Extension Petition. On August 6, 1998, the Director denied Petitioner's Extension Petition.

Petitioner requests review of the Director's August 6, 1998, decision.

DISCUSSION

The Commissioner has the authority to waive any of the PTO regulations pursuant to 37 C.F.R. § 10.170, which provides in pertinent part:

(a) In an extraordinary situation, when justice requires, any requirement of the regulations of this part which is not a requirement of the statutes may be suspended or waived by the Commissioner

An "extraordinary situation" for purposes of the waiver regulation is one which could not have been prevented by the exercise of ordinary care or diligence. See Nitto Chemical Indus. v. Comer, 39 USPQ2d 1778, 1782 (D.D.C. 1994) (finding that "oversight that could have been prevented by the exercise of ordinary care or diligence" is not an extraordinary situation). Petitioner has the burden to show that her circumstances rise to the level of an extraordinary situation which, in the interest of justice, requires a waiver.

In support of her request for waiver of the time requirement, Petitioner argues that she received a verbal grant of her Extension Petition, that she "had no reason to question" the verbal grant, and that she "was led to believe" the verbal grant was proper. Petition at 2. Accordingly, Petitioner argues, her request for regrade should be "reinstated." Id. at 3.

Petitioner's reliance on a verbal assurance is misplaced. As noted above, Petitioner bears the burden of showing that her personal circumstances rise to the level of an extraordinary situation. A determination of whether Petitioner has met her burden is made on the basis of the written record, not on a verbal assurance. See 37 C.F.R. § 1.2 ("No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.").

Petitioner's Extension Petition was filed nearly six weeks beyond the time to file a regrade request. The sole explanation for her failure to file a timely request for regrade was because Petitioner "was unaware that [she] could petition for substantive reconsideration and regrade of selected examination questions." Extension Petition at 1. Yet, in the January 22, 1998, letter informing Petitioner of her scores, she was advised:

. . . You may request a regrading of your examination pursuant to 37 C.F.R. § 10.7(c). . . . Your request must only address the merits of your original answer in simple, short, clearly written sentences. The burden of proof is on the applicant to establish that he or she is entitled to a greater score. The candidate is required to prove that the answer he or she darkened on the answer sheet is the most correct answer. Do not expect the content of your request to make up any shortcomings of your original answers.

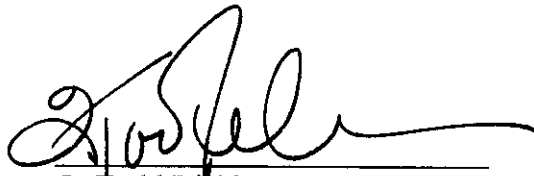
Attachment, at 1.

In light of these statements, Petitioner's argument that she "was unaware" until sometime after March 22, 1998, that she could seek substantive reconsideration of her scores on the registration examination is dubious. Moreover, Petitioner does not explain why she did not take the time prior to March 22, 1998, to verify that she properly understood the statements made in the Attachment. After all, Petitioner acknowledges that there were some questions she "would very much have wished to have been reconsidered." Extension Petition at 1. Accordingly,

Petitioner has not shown that her circumstances rise to the level of an extraordinary situation which, in the interest of justice, requires a waiver of the time requirement for filing a request for regrade.

CONCLUSION

Petitioner's request for a waiver of the time requirement for filing a request for regrade of her score on the morning section of the August 27, 1997, registration examination is denied.

A handwritten signature in black ink, appearing to read 'Q. Todd Dickinson', written over a horizontal line.

Q. Todd Dickinson
Acting Assistant Secretary of Commerce
and Acting Commissioner of Patents and Trademarks